



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CIVIL SUIT NO. 448 OF 2002**

**1. FATIMA LOBO**

**2. IGNATIUS PEREIRA**

**3. THE REGISTERED TRUSTEES OF**

**THE GOA COMMUNITY MOMBASA.....PLAINTIFFS/APPLICANTS**

**=VERSUS=**

**1. THE CATHOLIC DIOCES OF MOMBASA REGISTERED TRUSTEES**

**2. THE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**RULING**

1. This is the Notice of Motion dated 30<sup>th</sup> October 2017. It is brought under Order 8 Rule 3 of the Civil Procedure Rules, 2010, Section 100, 1A, 1B, 3 and 63(e) of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

**(i) That this honourable court be pleased to grant leave to the plaintiffs/applicants to further amend the amended plaint in terms of the draft further amended plaint filed with this application upon payment of the requisite court fees.**

**(ii) That the defendants be granted leave to amend their defence (if need be) within 14 days from the date of service of the further amended plaint**

**(iii) That the costs of this application be in the cause.**

3. The grounds are on the face of the application and are listed in paragraphs a-e. I do not need to reproduce them here.

4. The application is supported by the affidavit of Ignatius Pereira, one of the trustees of the 3<sup>rd</sup> plaintiff/applicant sworn on the 30<sup>th</sup> October 2017.

5. The application is opposed. There are grounds of opposition filed by the 1<sup>st</sup> defendant/respondent dated 2<sup>nd</sup> November 2017. The 2<sup>nd</sup> defendant/respondent has also filed a statement of grounds of opposition dated 9<sup>th</sup> November 2017.

6. On 16<sup>th</sup> November 2017, it was agreed that the application be disposed by way of written submissions. Each party was given twenty one (21) days to file their respective submissions. By 19<sup>th</sup> March 2018, no submissions had been filed on behalf of the 2<sup>nd</sup> defendant/respondent. A date for ruling was then given.

7. It is there plaintiffs'/Applicants' submissions that, Order 8 Rule 3 of the Civil Procedure Rules 2010 provides for amendment of pleadings with leave of the court. Further that Section 100 of the Civil Procedure Act donates general powers to courts to amend pleadings. They have relied on the case of **Eastern Bakery vs Castelino [1958] EA 461**, where Sir Kenneth O' Connor, President of the then Court of Appeal for Eastern Africa, said at pg 462;

***“It will be sufficient...to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be***

*made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”*

That the defendants/respondents have not demonstrated what injustice they will suffer if the plaintiffs’ application to further amend the plaint herein is allowed.

That the respondents will be granted leave to amend their defences if need be.

8. In response to the 1<sup>st</sup> defendant’s/respondent’s grounds of opposition, that the orders sought seek to create a new cause of action that is highly prejudicial to the 1<sup>st</sup> defendant/respondent, the applicants submitted that the amendment is only in regard to the prayers and do not extend to the facts pleaded in order to amount to creating a new cause of action. That the 1<sup>st</sup> respondent’s grounds of opposition is therefore misconceived and misplaced.

9. They have also relied on the case of **George Albert Ambuga v Kajiado County Government & Another (2015) eKLR, Micro & Small Enterprises Association of Kenya, Mombasa Branch v Mombasa County Government & Others (2014) eKLR.**

10. In response to the 2<sup>nd</sup> respondent’s grounds of opposition, the application submitted that the suit herein is founded on the subject agreement which goes into ownership and management of the suit property which involves land. That this court is seized of the jurisdiction to hear and determine this matter. The applicants urge the court to find the grounds of opposition to be unmerited and that the application ought to be allowed with costs.

11. It is the 1<sup>st</sup> defendant/respondent’s submissions that the application is fatally defective and the same lacks merit. That the amendment sought shall jeopardize the 1<sup>st</sup> defendant on reasons that the same raises a new cause of action. That the same is an abuse of the court process and has been brought after a long and unexplained delay. They have put forward the case of **AAJ Holdings Limited vs Diamond Shields International Ltd [2014] e KLR.**

12. That the cause of action arose from a contract hence the plaintiff’s intended amendments are barred by Section 4(1) of the Limitation of Actions Act. Section 16(2) of the Government Proceedings Act, forbids court from giving an injunction against the government. That this honourable court has no jurisdiction to entertain the suit and grant the orders sought. They have put forward the case of **Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General and 8 Others [2015] eKLR.** They urge that the application be dismissed.

13. It appears the 2<sup>nd</sup> respondent never put in written submissions. They did put in grounds of opposition dated 9<sup>th</sup> November 2017. Basically that the application is not merited as the suits is defective, fatal and ripe for dismissal as the alleged cause of action could not have crystallised before registration.

14. I have considered the notice of motion, the affidavit in support, the respondents grounds of opposition. I have also considered the oral submissions of counsel and the authorities cited. The issue for determination is whether the plaintiffs’/applicants’ application is merited.

15. Order 8 rule 3(i) provides:-

*“subject to order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the pleadings, in such terms as to costs or otherwise may be just and in such manner as it may direct, allow any party to amend his pleadings”*

Rule 3 (5) states:

*“An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendments”.*

16. I am guided by the above provisions in finding that this court has discretion to allow any party to amend the pleadings at any stage before judgment. It is so provided in Rule 5(1) of the Civil Procedure Rules.

17. I find that no prejudice will be occasioned to the defendant/respondents as they will have a right to amend their defences if need be.

18. I find that it is in the interest of justice that I grant the orders sought. The plaintiffs/applicants have explained the delay in bringing this application at this stage. I find the explanation reasonable.

19. All in all I find merit in this application and the same is allowed in the following terms:-

**(a) That the plaintiffs/applicants are hereby granted leave to further amend the Amended Plaint in terms of the draft further Amended Plaint upon payment of the requested court fees.**

**(b) That the defendants are hereby granted leave to amend their defences (if need be), within 14 days from the date of service of the further Amended Plaint.**

**(c) That costs of this application be in the cause.**

It is so ordered.

**Dated and signed in Nairobi on this.....day of .....2018**

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**L. KOMINGOI**

**JUDGE**

**Dated and delivered at Mombasa on this 5<sup>th</sup> day of October 2018.**

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**JUDGE**